Supreme Court, U.S.
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No. 96-1841

In The

Supreme Court of the United States

October Term, 1996

STATE OF LOUISIANA, *et al.*,

Petitioners,

vs.

JENNIFER MISTRETTA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: The State of Louisiana through the Department of Public Safety and Corrections, Office of State Police, and James Timothy Brunett, who are defendants in the district court and the appellants in the Court of Appeals.

Respondents: Jennifer Evans Mistretta and Troy Mistretta, who are plaintiffs in the district court and the appellees in the Court of Appeals.

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REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE OPINION OF THE FIFTH CIRCUIT IN THIS CASE AND PRIOR DECISIONS OF THIS COURT.

Petitioners rely upon Supreme Court Rule 10.1(c) in seeking the grant of their requested Writ because they allege that the Fifth Circuit rendered its opinion in this case in direct conflict with prior decisions of this Court. However, no such conflict as asserted by Petitioners exists.

Most recently, this court in *Seminole Tribe of Florida v. Florida*, __ U.S. __, 116 S. Ct. 1114, 134 L. Ed. 2d 66 (1996), reaffirmed the principle that Title VII, 42 U.S.C. § 2000e, *et seq.*, represents an abrogation of Eleventh Amendment immunity by citing, with approval, this Court's prior decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). In reaffirming the principles of *Fitzpatrick*, this Court stated:

> Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. *Id.*, at 455. We noted that Section(s) 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that Section(s) 5 of the Amendment expressly provided that

> "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." See *id.*, at 453 [internal quotation marks omitted]. We have held through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment, and therefore, that Section(s) 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

116 S. Ct. at 1125. As the most recent pronouncement on this issue, this Court found that the Fourteenth Amendment and its subsequent enforcement provisions, such as Title VII, properly abrogate the Eleventh Amendment bar. Certainly, there is no clearer expression of the principles embodied in our Fourteenth Amendment than the right of an "employee" to be treated equally — free from discrimination.

Surely, if this Court intended to question *Fitzpatrick*, it would have done so. Instead, this Court utilized the opinion in *Fitzpatrick* as a clear example of Congress' use of its Fourteenth Amendment power to alter the balance between state and federal power struck by the Constitution. Thus, in its use of this power, Congress could extend federal power into the realm of the Eleventh Amendment. *Fitzpatrick* arose factually, as does the case at bar, from violations of Title VII.

A. *Fitzpatrick* is not in conflict with *Atascadero State Hospital v. Scanlon*

Petitioners base their entire argument on what they perceive to be a conflict between *Fitzpatrick* and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142 (1985), and

their interpretation of *Atascadero*. However, no such conflict exists.

As one of the first Eleventh Amendment decisions, the Court in *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890), held that the Eleventh Amendment barred a citizen from bringing suit against his own state in federal court, even though the Amendment does not expressly so provide. However, this immunity is not absolute. The courts recognize well established exceptions to the reach of the Eleventh Amendment bar.

Outlined by this Court in *Atascadero* are examples of the well established exceptions. The first exception given by *Atascadero* derives where a State waives its immunity and consents to suit in federal court. The second exception arises in cases where the Eleventh Amendment is "necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment," that is, by Congress' power to "enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment." *Atascadero*, 105 S. Ct. at 3145, citing *Fitzpatrick* with approval.

Nowhere in *Atascadero* does the court even question the reasoning and decision of *Fitzpatrick* wherein Congress' legislative expression of state liability under Title VII was upheld. On the contrary, the *Atascadero* court, citing *Fitzpatrick* with approval, recognizes that one of the areas wherein Congressional Fourteenth Amendment power clearly abrogates Eleventh Amendment immunity is in the exercise of power in amending Title VII.

Pursuant to the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress empowered federal courts to award monetary damages in favor of private citizens against a state government found to be in violation of the substantive provisions

of the Act. The Amendments expanded the coverage of Title VII applicable to the states as "employers" by expanding the definition of "employer" as a "person" to include "governments, governmental agencies and political subdivisions." 42 U.S.C. § 2000e. This Court affirmatively stated that Congress intended Title VII and its principles be applied to governmental and private employers alike. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720, 2728, n. 14, 53 L. Ed. 2d 786 (1977).

Petitioners maintain that a conflict exists between *Atascadero* and *Fitzpatrick* because Petitioners allege no independent evaluation of Title VII has been performed in light of the *Atascadero* criteria. Petitioners' argument is misleading. This Court already found that Congress expressly intended the 1972 Amendments to Title VII to be applicable to the states in *Dothard*. *Fitzpatrick* established that Congress had the power pursuant to the Fourteenth Amendment to enact the 1972 Amendments to Title VII and that "Congress' exercise of power in this respect is also not barred by the Eleventh Amendment." *Fitzpatrick*, 96 S. Ct. at 2672. *Atascadero*, in citing *Fitzpatrick* with approval, recognized that Title VII was a clear expression of Congressional intent to abrogate the Eleventh Amendment.

Although *Atascadero* did not address Title VII, it clearly cites *Fitzpatrick* as authority. The *Atascadero* Court addressed the Rehabilitation Act under Title VI of the Civil Rights Act of 1964. In the body of its opinion, *Atascadero* cites *Fitzpatrick* in its reiteration that the Eleventh Amendment is "necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment," and that Congress can abrogate the Eleventh Amendment when acting pursuant to the Fourteenth Amendment. *Atascadero*, 105 S. Ct. at 3145, citing *Fitzpatrick*. Therefore, *Atascadero* implicitly recognized Title VII, as amended, to be a clear and unequivocal expression of Congressional abrogation of the Eleventh Amendment.

Thus, it is unequivocally clear that the Fifth Circuit's ruling in the case at bar is not in conflict with *Atascadero*. The Fifth Circuit, in directly addressing Petitioners' concerns held:

> In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that Congress had abrogated the states' Eleventh Amendment immunity by enacting Title VII. *Id.* at 452. Although the focus of the decision was congressional power to abrogate under Section 5 of the Fourteenth Amendment, the Court also stated that "the threshold fact of congressional authorization to sue the State as employer is clearly present." *Id.* at 452 [internal quotations and citations omitted] . . . Louisiana protests that because *Atascadero* is the seminal case on precisely what Congress must do to abrogate state immunity, it "at the very least modified *Fitzpatrick*, if not implicitly overruled it." We disagree, for nowhere in *Atascadero* did the Court even so much as call *Fitzpatrick* into doubt or question its affirmation of that decision in *Quern v. Jordan*, 440 U.S. 332 (1979).

Opinion of the Fifth Circuit, Pet. App. 1a. The same situation is present here. Nowhere under any reading does *Atascadero* even question *Fitzpatrick*. There is clearly no conflict justifying the grant of the Writ sought by Petitioners in this case.

B. The Fifth Circuit's decision in *Pegues v. Mississippi State Employment Service* clearly was correct and its reliance upon *Pegues* was not misplaced

Petitioners additionally argue that the Fifth Circuit erred in

relying upon the decision of *Pegues v. Mississippi State Employment Service*, 899 F.2d 1449 (5th Cir. 1990). However, the Fifth Circuit in *Pegues* correctly concluded that Title VII affords federal courts the ability to assess liability against a state as an abrogation of the Eleventh Amendment. The *Pegues* court, in assessing Title VII in light of the Eleventh Amendment and the exceptions thereto, held "the Act [Title VII] clearly abrogates the states' Eleventh Amendment immunity by providing that courts may award retroactive monetary relief against state defendants which violate Title VII". *Pegues* at 1453.

Petitioners suggest that *Pegues* also was wrong because "nowhere does Title VII provide that the federal courts may award monetary relief against 'state defendants' for violations of the Act." Petitioners' Petition for Writ of Certiorari at 15. Petitioners' argument is misleading. Title VII is expressly applicable to the State of Louisiana and allows back pay, front pay, and other monetary relief, including damages, as a remedy for violations of the Act. One need only review the definition of "employee" as contained in 42 U.S.C. § 2000e(f) which mandates that "employee" includes an employee of a state. Also, the definition of "person" in 42 U.S.C. § 2000e(a) contains similar language as 42 U.S.C. § 1981a. The State of Louisiana has already successfully argued that the language "government, governmental agency, or political subdivision" contained in 42 U.S.C. § 1981a clearly means them. The State of Louisiana argued that this language specifically applies to them so that they cannot be liable for punitive damages under 42 U.S.C. § 1981a, but somehow the identical language in Title VII is not.

Petitioners' seek this Writ because they allege a conflict between decisions. Respondents limit their argument only to the merits of Petitioners' request for the Writ. Under any analysis, there is no conflict between decisions.

CONCLUSION

Petitioners fail to demonstrate any conflict between the decision of the Fifth Circuit in the case at bar and any prior decisions of this Court. There exists no reason to disturb that which is patently clear upon a fair reading of all of the decisions cited by Petitioners. Title VII clearly and unequivocally applies to the State of Louisiana and Eleventh Amendment immunity is not available.

Respectfully submitted,

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